



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 10, 2020

Ravinder S. Kapoor
Senior Attorney
State Treasurer's Office
915 Capitol Mall, Suite 110
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. I-20-102

Dear Mr. Kapoor:

This letter responds to your request for advice on behalf of Treasurer Fiona Ma regarding the behested payment provisions of the Political Reform Act (the "Act").¹ Because your inquiry is general in nature, we are treating your request as one for informal assistance.²

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Given that Treasurer Ma, an elected official, is the Chair of the ScholarShare Investment Board ("SIB"), a government entity that will fundraise for the California Kids Investment and Development Savings Program Fund, a government program designed to support the opening of college savings accounts for children, will funds raised through solicitations by SIB staff or grant applications by a grant writer constitute reportable behested payments?

CONCLUSION

Under Regulation 18215.3(b), funds raised through solicitations by SIB staff and grant applications submitted by a contracted grant writer would not constitute behested payments if those solicitations and applications do not "feature" Treasurer Ma, as described below.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

FACTS AS PRESENTED BY REQUESTER

Created by statute in 1997, the ScholarShare Investment Board (“SIB”) is an instrumentality of the State of California that administers the State’s 529 college savings plan. The Treasurer serves as chair of the seven-member board, and the State Treasurer’s Office provides administrative support to SIB in areas such as information technology, legal, external communications, human resources, finance/budget, facilities, etc.

In 2019, the Legislature created the California Kids Investment and Development Savings Program Fund (“KIDS program”) in Senate Bill 77 (Budget) and amended later the same year by Assembly Bill 114. The Legislature directed SIB to operate the KIDS program, and designed it to support the opening of college savings accounts for children born on or after July 1, 2020. The Legislature only provided a one-time \$25 million general fund appropriation for the program. This funding is estimated by program staff to be exhausted in approximately one to two years after the start of the program. Absent any future appropriations by the Legislature, the only apparent future funding mechanism for the program is fundraising. Specifically, SIB is authorized by statute to “accept gifts, grants, awards, matching contributions, interest income, and appropriations from individuals, business, state and local governmental entities, and third-party sources for the program.” (Education Code Section 69996.2(b)(1).) Further, SIB is directed to report to the Department of Finance and the Legislature by January 1, 2022 information pertaining to the KIDS program’s first year of implementation, including a “description of the board’s efforts and success in soliciting philanthropic or nonstate money to support the program.” (Education Code section 69996.2(c)(5).)

It appears that the Legislature intends that SIB fundraise between \$8-10 million per year to fund the KIDS program after the initial \$25 million appropriation is exhausted. Given the large amount of fundraising required to sustain the KIDS program, an aggressive annual fundraising effort will be required by SIB. SIB has developed a fundraising plan that involves SIB staff directly soliciting donations and using a contracted grant writer to submit grant applications to various philanthropic organizations. Fundraising efforts for the KIDS program would be briefed to the SIB at its quarterly board meetings, which are chaired by Treasurer Ma.

In accordance with previous guidance by the Commission, Treasurer Ma will not be featured in any fundraising efforts conducted by SIB staff. However, Treasurer Ma is requesting assistance in determining what effect, if any, behested payment laws and regulations may have on her as an elected official if SIB implements the fundraising plan described above.

ANALYSIS

Under Section 82004.5 of the Act, the term “behested payment” includes a payment made at the behest of an elected officer, or his or her agent, and “it is clear from the surrounding circumstances that the payment was made for purposes unrelated to the officer’s seeking or holding of elective office.” (Section 82004.5(c).) The phrase “made at the behest of” means “made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of.” (Section 82041.3; Regulation 18215.3.)

Section 84224 imposes reporting requirements for behested payments that satisfy each of the following requirements:

- (1) The payment is made at the behest of an elected officer or member of the Public Utilities Commission;
- (2) The behesting elected officer or member of the Public Utilities Commission does not provide full and adequate consideration in exchange for the payment;
- (3) The payment is made principally for a legislative, governmental, or charitable purpose; and
- (4) If made principally for a legislative or governmental purpose, the payment is made by a person other than a state, local, or federal governmental agency.

(Section 84224(b).)

A behested payment that meets the above description must be reported and filed with the official's agency within 30 days following the date on which the payment or payments equal or exceed \$5,000 in the aggregate from the same source in the same calendar year in which they are made. (See Section 84224(a).) The report must include: "name of payor; address of payor; amount of the payment or payments; date or dates the payment or payments were made; the name and address of the payee; a brief description of the goods or services provided or purchased, if any; and a description of the specific purpose for which the payment or payments were made." (*Ibid.*) Thereafter, any additional payments made by that same single source must also be reported within 30 days after the payment was made. (*Ibid.*) Within 30 days after receipt of any such report, state agencies must forward a copy of the report to the FPPC. (*Ibid.*)

In *Kapoor* Advice Letter, No. I-20-017, we wrote:

Regulation 18215.3(b) addresses narrow circumstances in which behested payment reporting is not required, because "[a] payment is not 'made at the behest of' an elected officer or a PUC member and is not subject to behested payment reporting if the payment is made in response to a fundraising solicitation from a charitable organization requesting a payment unless the solicitation features an elected officer or PUC member." In this case, the facts provided indicate that the KIDS program will be seeking funding necessary to continue its operation for governmental and charitable purposes. Under these facts, we find that the KIDS program is both a governmental entity and charitable organization for purposes of Regulation 18215.3(b). Accordingly, payments made in response to a solicitation are not reportable by Treasurer Ma if she is not featured in the solicitation.

The above advice remains applicable to the fundraising plan you have described. If Treasurer Ma is not featured in the solicitation, Regulation 18215.3(b) is applicable and funds raised by the SIB will not constitute payments behested by Treasurer Ma. The Commission adopted the regulation in response to advice requests concerning fundraising letters (See September 22, 2011 Commission Meeting Memorandum, "Adoption of Proposed Regulation 18215.3 – Behested Payment Reporting: Charitable Donation Solicited by Elected Officers or Members of the Public Utilities Commission" and *Filchev* Advice Letter, No. I-09-073). Regulation 18215.3(b)(1) reads, "a solicitation 'features an elected officer or PUC member' if the item mailed includes the elected

officer's photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color." "An elected officer or PUC member is also featured in a solicitation if the roster or letterhead listing the governing body contains a majority of elected officers or PUC members." (Regulation 18215.3(b)(2).) Thus, having SIB staff mail fundraising solicitations (including grant applications) not featuring Treasurer Ma would not implicate the Act's behested payment provisions, nor would having fundraising efforts briefed to the SIB, including Treasurer Ma acting in her capacity as a board member.

Nonetheless, while SIB letters and grant applications not "featuring" Treasurer Ma would fall into Regulation 18215.3(b)(1)-(2), there is no similar provision specifying the circumstances in which other forms of solicitation, such as telephone calls, do or do not "feature" an elected officer. Thus, if SIB staff solicit donations through other means, such as telephone calls, the determination of whether any particular solicitation "featured" Treasurer Ma could be made only on a case by case basis after reviewing the specific communication. However, generally, solicitations made by agency staff that do not identify or reference Treasurer Ma in any way would not result in reportable behested payments merely because Treasurer Ma serves as the chair of the SIB pursuant to state law.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel



By: Kevin Cornwall
Counsel, Legal Division

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